IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

FRIDAY, THE 27TH APRIL 2007 / 7TH VAISAKHA 1929

WP(C).No. 33803 of 2006(Y)

PETITIONER:

JACOB THOMAS,
AGED 38 YEARS, S/O.THOMAS,
PAINAPPALLI HOUSE, POONTHANAM POST,
VIA.PATTIKKAD, MALAPPURAM DISTRICT.

BY ADV. SRI.V.A.MUHAMMED
SRI.K.E.HAMZA

RESPONDENTS:

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1. THE STATE OF KERALA,
REP. BY THE SECRETARY TO GOVERNMENT,
GENERAL EDUCATION DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DEPUTY DIRECTOR OF EDUCATION,
KOZHIKODE DISTRICT.

3. THE DISTRICT OFFICER,
KERALA PUBLIC SERVICE COMMISSION,
DISTRICT OFFICE, KOZHIKODE.

4. THE KERALA PUBLIC SERVICE COMMISSION,
REP. BY ITS SECRETARY,
P.O.PATTOM PALACE, THIRUVANANTHAPURAM.

R3 & R4 BY ADV. SRI.P.C.SASIDHARAN, SC, KPSC
R1 & R2 BY GOVT. PLEADER SRI. A.J. VARGHESE.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 27/04/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.M.JOSEPH, J.

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WP.(C) No.33803 OF 2006

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Dated this the 27th day of April, 2007

JUDGMENT

Case of the petitioner in brief is as follows:

Petitioner applied for the post of HSA (Maths) in Kozhikode District as per Ext.P1 notification. Ext.P2 rank list was published with effect from 1.3.2005, in which petitioner is ranked No.1. Petitioner refers to G.O.(Ms) No.232/71/PD dated 12.8.1971 to contend that once vacancies are reported to the Public Service Commission, they should neither be cancelled nor reduced. There is reference to Circular dated 5.12.1972, which according to the petitioner is to the effect that all appointing authorities were directed to ensure that vacancies once reported to the Commission are kept open for regular appointment for their advice. By Circular dated 2.6.1981 Government directed all appointing authorities to follow the instructions scrupulously in future. By Ext.P3 Circular dated 24.4.1984 issued by the Government it is ordered that once vacancies are reported for direct recruitment, they are not to be cancelled or reduced or filled up by other methods such as

promotion, transfer or deputation etc. Petitioner prays for a direction to the third respondent to advice his name to the second respondent to appoint the petitioner as HSA (Maths) in any one of the reported vacancies. He also seeks a direction commanding the second respondent to appoint the petitioner as High School Assistant (Maths) in any one of the reported vacancies.

2. A statement is filed by the second respondent. It is inter alia stated as follows:

During the year 2006-2007 no vacancy of HSA (Maths) has been reported to PSC for appointment and at present there is no existing vacancy. Government as per G.O.(MS) 11/02/G.Edn., dated 7.1.2002 introduced a new cadre of HSA (English) from the academic year 2002-2003 changing the existing ratio 1:1:1 between Science, Maths and Social Science in core subject by re-allocating the periods of English till then allocated to the HSA on Science, Maths and Social Science. Government ordered that the new cadre will be created in a phased manner without causing retrenchment to the existing HSAs in core subjects by appointing/promoting qualified hands against the

vacancies caused by retirement/additional division, resignation/leave etc., observing the minimum subject requirement between Science, Maths and Social Science with a view to achieve the object of distribution of posts envisaged in the table given in the appendix of the Government Order. It is further stated that as a result of the instruction of the new table for core subject, approximately one fourth of the existing HSA (Maths) became surplus. The vacancies caused due to the retirement of HSA (Maths) are duly filled up by HSA (English) during 2006-07. The total number of posts of HSA (Maths) sanctioned in the whole revenue district is 286 against which 333 hands are working. It is stated that there is surplus of 47 HSA (Maths) in service at present. Hence there is no chance of appointment of the petitioner during the year.

3. The Commission has taken the stand inter alia that the notified vacancies were 2 and subsequently 3 more vacancies were reported. On finalisation there were five vacancies. It is pointed out that after finalisation of rank list Deputy Director of Education informed the Commission that consequent to the appropriation of the vacancies of

various subjects on introduction of a new cadre of HSA (English), there arose a situation by which 30 posts of HSA (Maths) became excess of the ratio prescribed. It is stated that accordingly the Deputy Director of Education informed the Commission that advice need not be issued to the five vacancies already reported. Accordingly Commission took up the issue and considered the matter and ordered not to make advice from the rank list. It is finally stated that the Commission can advice the vacancies which are substantive and when the appointing authority is of the view that there is no vacancy to be filled up, the Commission after examining the reasons stated by the appointing authority has not made advice .

4. In the reply affidavit filed by the petitioner, the petitioner has produced Ext.P4 Circular dated 21.3.1997 by which Government again reiterated that the standing instruction to report vacancies should be strictly adhered to. There is reference made to the instruction and clause No.(ii) of the said instruction reads as follows:

> "(ii) The Appointing Authorities should exercise extreme diligence and accuracy in reporting vacancies to the Public Service Commission. **When once the vacancies**

> **are reported to the Commission they should neither be cancelled nor reduced.** They should also note that the date of occurrence of the vacancy should be treated as the crucial date for deciding the method of appointment. The practice, if any, of filling the vacancies by promotion/transfer after reporting the vacancies to the Commission should be discontinued."

Petitioner has also produced Ext.P5 judgment of this court reported in **K.Harindran v. State of Kerala** (ILR 2006(4) Kerala 680). Therein the Division Bench has taken the view as follows:

> "When a vacancy is already reported to the Public Service Commission, that cannot, in any manner, be filled up, except as provided in circular No.4441/Adv-C3/97/P & ARD dated 21.3.1997."

Petitioner also refers to decisions to point out that once interpretation is given to a particular provision, Government is bound to implement the same in uniformity in all offices concerned. The Division Bench of this court considered the question in the context of the following short facts. The appellant in that case entered in service in the year 2001. There was a vacancy of LD typist Kannada. The method of

appointment provided for filling up the post by appointing the fully qualified hand in service and in his absence a direct recruitment was possible. As none was available in service, it was reported to the PSC in 1999. While recruitment was in the mid way, appellant was appointed as Peon. As he was qualified for being appointed as LD Typist Kannada he was so promoted. The PSC advised the fifth respondent. In order to accommodate the fifth respondent the appellant was proposed to be reverted. It was in the context of the said facts that the court relied on the definition of the word "recruited direct" and also Ext.P4 circular dated 21.3.1997, which I have already referred to, to find that the filling up of the post of L.D.Typist by promoting the appellant was not justified. It was found that such filling up can at best be temporary. On the one hand placing reliance on the judgment, counsel for the petitioner would contend that in so far as admittedly vacancies were reported as evident from the affidavit of the PSC, those vacancies are to be filled up by appointing persons from the rank list prepared by the PSC alone and no other method of appointment is permissible.

5. On the other hand it is pointed out on behalf of the respondents that the decision of this court may not apply to the facts of this case. In this case in fact no advice has been made as such. This is a case where Ext.P1 notification pursuant to which Ext.P2 rank list was prepared was published on 1.10.2002. However Government has issued G.O.(MS) 11/02/G.Edn., dated 7.1.2002, whereunder a new cadre of HSA (English) was created from the academic year 2002-2003. The existing ratio came to be changed. There is no permanent strength as far as Schools are concerned. Staff strength is fixed for every year by virtue of staff fixation orders. It is clear that matters have to be implemented in terms of Government Order dated 7.1.2002. If Government Order dated 7.1.2002 is to be implemented, it is obvious that the claim of the petitioner cannot be satisfied. Apparently the Commission was also satisfied with the view of the appointing authority that there is no vacancy to be filled up and hence refused to make advice. This is apparently in view of the fact that consequent upon the appropriation of vacancies to various subjects by the introduction of new cadre of HSA (English), there are excess hands in

Mathematics. I feel that the stand of the respondents appears to be legal and correct.

In such circumstances, I do not think that the petitioner has made out a case for directing issuance of advice and order of appointment having regard to the facts presented in the case.

The writ petition is dismissed.

(K.M. JOSEPH, JUDGE)

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K.M.JOSEPH, JJ.

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W.A. No. OF

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JUDGMENT

Dated this the day of February, 2006.